MASTER JAYA ENVIRONMENTAL SDN BHD v. PENTAS FLORA SDN BHD

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
HANIPAH FARIKULLAH JCA
KAMALUDIN MD SAID JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1203-06-2018]
31 OCTOBER 2019

CONTRACT: *Breach – Warranty and guarantee – Claim for losses and damages – Purchaser bought specialised equipment for air pollution control from seller – Whether seller's scrubber system not fit for its purpose – Whether purchaser suffered loss of profits due to suspensions by Malaysian Department of Environment – Whether purchaser suffered losses and damages due to seller's negligence resulting in explosion at purchaser's plant – Whether seller complied with all terms and obligations of contract – Whether seller vicariously liable for negligence of its sub-contractors – Whether trial judge correct in assessing quantum of damages*

The respondent ('plaintiff') bought specialised equipment for air pollution control from the appellant ('defendant') *ie*, two scrubbers, namely Scrubber No. 8 and No. 9, with the ability to eliminate bad odour and fumes being emitted into the environment. The total contract price was RM1,000,000 and the plaintiff paid RM550,000 leaving the balance of RM450,000. However, even with the installation of the scrubbers, the odour problems at the plant did not improve and consequently the plaintiff's operation was suspended by the Malaysian Department of Environment ('DOE') on two occasions. Separately, there was an explosion/fire at the plant whilst the contractors were carrying out repairs to rectify some complications in scrubber No. 8, resulting in the plant being shut down for days. Since the bad odour problems did not abate, the plaintiff changed the whole of scrubber No. 8 with a new equipment provided by a third party. At the High Court, the plaintiff claimed that the defendant's scrubber system was not fit for its purpose and that there was a breach of warranty by the defendant. The plaintiff had suffered loss of profits as the plaintiff had to provide discount to its customers to compensate for the shortcoming of the products and was forced to source processed oil from suppliers in order to resell it to meet its customer's orders. Due to the defective scrubber system provided by the defendant, the plaintiff had to purchase new equipment from a third party. The workers who were fixing the problem which caused an explosion at the plaintiff's plant were the defendant's contractors/sub-contractors. The plaintiff prayed for loss of profits due to suspensions by DOE, losses and damages due to the defendant's negligence which resulted in an explosion at the plaintiff's plant, a refund of all monies paid to the defendant and costs involved in the purchase of new equipment and clean-up operations costs due to the explosion caused by the defendant's negligence. The defendant, in its

defence, alleged that there was nothing wrong with the scrubber system and that it did not function perfectly and properly because the plaintiff used dirty recycled water and did not adhere to the performance monitoring obligations under the contract. The defendant had complied with all the terms of the contract with the plaintiff. The defendant submitted that it was not responsible for the explosion incident as it was carried out by an independent contractor who had been engaged and instructed by the plaintiff itself. The defendant made a counterclaim against the plaintiff for the balance of the contract sum and the cost of replacing Scrubber No. 8 which was damaged during the explosion/fire and damages for breach of contract and loss of reputation. At the end of the trial, the High Court held that the plaintiff had established their claim on a balance of probabilities, *inter alia*, that there was a breach of warranty and failure on the defendant's party to fulfil the guarantee that would comply with DOE's requirements. The defendant was liable for losses sustained by the plaintiff during both periods of suspensions and those arising out of the explosion incident. The defendant's counterclaim was dismissed. Thus, the defendant appealed. It was the defendant's case that the plaintiff had not discharged the burden of proof in proving the claims against the defendant and that the trial judge had failed to make a proper assessment on the evidence; therefore, the decision was erroneous in fact and in law which required this court to intervene.

Held (dismissing appeal with costs)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) Although scrubber No. 8 was installed on 20 January 2015, the date of the testing and commissioning ('T&C'), the defendant's associated company, Master Jaya Greentech Sdn Bhd as notification consultant, only made the statutory submission for 'new construction' on behalf of the plaintiff on 18 June 2015. The submission to DOE ought, in fact, to have been done prior to the installation and commissioning of scrubber No. 8. The installation was done without DOE's knowledge or approval therefore, the plaintiff could not be deemed to have accepted the scrubber during the T&C conducted on 20 January 2015. (para 41)

(2) It was clearly the defendant's obligation to ensure that the person who handled scrubber No. 8 was a CePSO qualified person. The defendant was a DOE certified CePSO trainer and it would have been easy enough for the defendant to have trained the plaintiffs' staff so that they are CePSO qualified. However, the arrangement for training was only done after the DOE issued the first field citation on 3 June 2015 which warned the plaintiffs to make sure the scrubber is supervised/handled by a competent person (CePSO). Discussions on CePSO training only started after that. Clearly, the defendant failed to provide 'training' to the plaintiff since this was its contractual obligation. (para 52)

(3) The defendant's stand, that the emission of bad odour was due to the negligence of the plaintiff in its failure to maintain the scrubber properly was illogical to uphold on the ground that, if that was the case, then one would have expected as a matter of probabilities and sheer logic that the defendant would have, from the outset, noted the so-called problem with the waste water treatment plant ('WWTP') and inform the plaintiff accordingly. But this was not done. The defendant did not furnish any technical evidence to prove on a balance of probabilities that the WWTP was the culprit which was impeding scrubber No. 8's efficiency and caused bad odour to be emitted into the environment. Since it was the defendant who designed scrubber No. 8, it was their obligation, as the air pollution control experts, to have advised the plaintiff, if it was true that the WWTP was the source of the problems. (paras 60 & 61)

(4) Scrubber No. 8 was not fit for purpose (s. 16 of the Sale of Goods Act 1957) and the defendant's warranties/guarantee on scrubber efficiently were not fulfilled as such. Scrubber No. 8 was not up to mark as an air pollution control device. It was quite useless as far as the plaintiff was concerned as they were still having problems with DOE and, eventually, they had to replace it with equipment from China. Clearly, scrubber No. 8 was not able to control bad odour pollution and it had therefore failed as an air pollution control device. (para 71)

(5) It was more probable than not that it was the defendant who made the arrangements for workers to be sent to repair scrubber No. 8 and they were accordingly vicariously liable for the negligence of their contractor/sub-subcontractor. The workers were the sub-agent of the defendant and the defendant was liable for the acts of its sub-agent. The High Court's finding of the negligence was entirely factual. There were no errors which required appellate intervention. (paras 78 & 80)

(6) The defendant referred to the letter of performance guarantee and relied on the exclusion clause then argued that because of this document they need not pay the plaintiff at all. The defendant also submitted that the warranty clause in the agreement did not include any damage and/or losses due to production losses and consequential losses. Firstly, the exclusion clause was uncertain, unclear and unambiguous. Secondly, due to the ambiguity, the *contra proferentum* rule was applied against the defendant and the exclusion clause was held to be ineffective. Thirdly, the defendant's argument that the plaintiff's losses were 'consequential losses' and therefore excluded by the exclusion clause was dismissed. The trial judge had not acted on the wrong principle in assessing the quantum of damages. Since there was no appealable error in the judgment, this court declined to disturb the findings on the quantum of damages awarded by the trial judge to the plaintiff. (paras 83 & 88)

Case(s) referred to:

Alliedbank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***
AmBank (M) Bhd v. Luqman Kamil Mohammed Don [2012] 3 CLJ 551 FC ***(refd)***
Anuar Mat Amin v. Abdullah Mohd Zain [1989] 1 LNS 74 HC ***(refd)***
Blay v. Pollard & Morris [1930] 10 1 KB 628 ***(refd)***
Croudace Construction Ltd v. Cawoods Concrete Products Ltd [1978] 2 Lloyds 55 ***(refd)***
Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC ***(refd)***
Eastern Supply Co v. Kerr [1973] 1 LNS 25 HC ***(refd)***
Flint v. Lovell [1934] All ER 200 ***(refd)***
Hong Leong Bank Bhd v. Asakura Industry Sdn Bhd & Ors [2010] 1 LNS 2031 HC ***(refd)***
Kee Boon Suan & Ors v. Adventist Hospital & Clinical Services (M) & Ors And Other Appeals [2018] 6 CLJ 334 CA ***(refd)***
Leaf v. International Galleries [1950] 1 All ER 693 ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Mohamed Ibrahim & Anor v. Christopher Piff & Anor [1980] 1 LNS 139 FC ***(refd)***
Sampo Materials (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 9 CLJ 902 CA ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***
Tan Leng Choo & Ors v. Law Teck Huat [2008] 1 LNS 568 CA ***(refd)***
Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***
The United States Of America v. Shearn Delamore & Co And Drew & Napier; Joseph Lee Henn Shen (Third Party) [2007] 4 CLJ 154 HC ***(refd)***
UEM Group Bhd v. Genysis Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010] 4 CLJ 203 CA ***(refd)***

Legislation referred to:

Sale of Goods Act 1957, ss. 41(1), 42

For the appellants - William Foo, Valerie Chong, Priscilla Goh & Lim Wan Ci; M/s Valerie Chong & Co
For the respondent - Yudistra Darma Dorai & Effa Ruzanna Anuar; M/s Raj Ong & Yudistra

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22NCVC-670-12-2015 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] This is the appellant's appeal against the decision by the learned High Court Judge of Kuala Lumpur, given on 31 May 2018 in favour of the respondent.

[2] The appellant herein was the defendant whereas the respondent named herein was the plaintiff. The parties shall be referred to as they were in the court below.

Brief Facts

[3] The plaintiff bought specialised equipment for air pollution control from the defendant, ie, two scrubbers namely Scrubber No. 8 and No. 9 with the ability to eliminate bad odour and fumes being emitted into the environment. The total contract price was RM1,000,000 and the plaintiff paid RM550,000 leaving the balance of RM450,000.

[4] However, even with the installation of the scrubbers, the odour problems at the plant did not improve, and consequently, the plaintiff's operation was suspended by the Malaysian Department of Environment (DOE) on two occasions.

[5] Separately, there was an explosion/fire at the plant whilst the five contractors were carrying out repairs to rectify some complication in Scrubber No. 8. The explosion resulted in the plant being shut down for five days. Since the bad odour problems did not abate, the plaintiff changed the whole of Scrubber No. 8 with new equipment which was provided by a third party.

[6] At the High Court, the plaintiff claims that the defendant's scrubber system is not fit for its purpose and that there was a breach of warranty by the defendant. Consequent to the above, DOE has suspended the plaintiff's operations on two occasions. The plaintiff suffered loss of profits as the plaintiff had to provide discount to its customers to compensate for the shortcoming of its products and was forced to source processed oil from suppliers in order to resell it to meet its customer's orders. Due to the defective scrubber system provided by the defendant, the plaintiff had to purchase new equipment from a third party. The workers who were fixing the problem which caused an explosion at the plaintiff's plant were the defendant's contractor or sub-contractor.

[7] The plaintiff prays for loss of profits due to suspensions by DOE, loss and damages due to the defendant's negligence which resulted in an explosion at the plaintiff's plant, refund of all monies paid to the defendant, and costs involved in the purchase of new equipment from a third party and clean-up operations costs due to the explosion caused by the defendant's negligence.

[8] The defendant in its defence alleged that there was nothing wrong with the scrubber system and that it did not function perfectly and properly because the plaintiff used dirty recycled water and did not adhere to the performance monitoring obligations under the contract. The defendant had complied with all the terms of the contract with the plaintiff. The defendant is not responsible for the explosion incident as it was carried out by an independent contractor who had been engaged and instructed by the plaintiff itself.

[9] The defendant made a counterclaim against the plaintiff for the balance of the contract sum and the cost of replacing Scrubber No. 8 which was damaged during the explosion/fire and damages for breach of contract and loss of reputation.

High Court's Decision

[10] There were two causes of action stated by the learned judge in his grounds of judgment ie, claim for breach of contract and negligence.

[11] The claim for breach of contract arose from the alleged suspension of the plaintiff's operations by the DOE because the scrubbers did not work in reducing the bad odour. In this case, the Scrubber No. 8 which was designed and delivered by the defendant failed to function in accordance with the plaintiff's needs and in compliance with DOE's requirements and the relevant environmental regulations. Subsequently, the issue of losses suffered by the plaintiff.

[12] The claim for negligence arose from the explosion which occurred when the defendant was carrying out repair works in the plaintiff's premises. The plaintiff claimed that the defendant was negligent in causing or permitting Scrubber No. 8 to fall off and exploded and/or causing or permitting Scrubber No. 8 to be repaired in an unsafe and dangerous manner (by way of "spot-welding"). Subsequently, the defendant is liable/ responsible for the repair works on Scrubber No. 8 on 24 June 2015. Consequently, the issue of losses suffered by the plaintiff.

[13] At the end of the trial, the learned judge made his finding of facts that the plaintiff had established their claim on a balance of probabilities, *inter alia*, that there was a breach of warranty and failure on the defendant's part to fulfill the guarantee that will comply with DOE's requirements. The defendant is liable for losses sustained by the plaintiff during both periods of suspensions and those arising out of the explosion incident. The defendant's counterclaim was dismissed.

[14] The clear finding of the learned judge is that the Scrubber No. 8 failed to function. The defendant failed to prove that the scrubber may attain 60 - 70% efficiency at removing bad odour as guaranteed by them. No contemporaneous evidence to suggest that the scrubber did not function perfectly and properly because the plaintiff used dirty recycled water and did not adhere to the performance monitoring obligations under the contract as claimed by the defendant.

[15] The learned judge found that the defendant had breached the contract. The scrubber design failed to meet the DOE's requirement meant to sufficiently remove odour from the waste air which flows from the dehydration process of waste oil. The learned judge found that there were various assurances and warranties made by the defendant *via* its letter of warranty, letter of offer and letter of performance guarantee.

[16] The learned judge also found that the defendant is liable for the explosion incident at plaintiff's plant. Based on witnesses' evidence, it was the defendant who made the arrangements or workers to be sent to repair Scrubber No. 8 and therefore they are vicariously liable for the negligence of their sub-contractor.

[17] Finally, the learned judge held that the defendant is liable for the losses suffered by the plaintiff during both periods of suspension and those arising out of the incident on 24 June 2015. The plaintiff's claim was allowed.

[18] The learned judge dismissed the defendant's counterclaim, however, ordered that the plaintiff refund to the defendant the sum of RM207,500 in the event the plaintiff's insurers pay this sum to the plaintiff with a qualifier that this is only if the judgment sum has been settled, failing which the plaintiff is at liberty to apply the insurance proceeds to account of the judgment that was ordered.

The Grounds Of Appeal

[19] There are various grounds of appeal set out in the memorandum of appeal. In the written submission and oral submission of defendant's counsel, the grounds raised were basically on the arguments that the scrubber supplied to the plaintiff at the plaintiff's plant is fit for its purpose and the defendant denied that the explosion which happened on 24 June 2015 was caused by the negligence of the defendant in repair work.

[20] Firstly, the defendant contended that the scrubber is fit for its purpose premised on the fact that the said scrubber was tested and commissioned through a testing and commissioning ("T&C") exercise conducted on 20 January 2015 with the presence of the plaintiff's representative, PW3. The T&C was to ensure that the scrubber was free from defects and was functioning properly. The defendant relied on the evidence of its own witness, DW5 who had confirmed it. It was also submitted that the plaintiff's witness, PW3 was given reasonable opportunity to inspect the said scrubber and accepted the scrubber by signing the defendant's daily report dated 20 January 2015 which had confirmed the tests run result of the scrubber (see p. 576 of common core bundle) and without any complaint.

[21] The defendant referred to s. 41(1) of the Sale of Goods Act 1957 which says that where goods are delivered to the buyer which he has not previously examined, he is deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

[22] Essentially, this means that if a purchaser had examined the goods, and had accepted them, he cannot then reject them after a reasonable time, as provided in s. 42 of the Sale of Goods Act 1957 which says that the buyer is deemed to have accepted the goods when he intimates to the seller that he

has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

[23] The defendant also referred to the case of *Eastern Supply Co v. Kerr* [1973] 1 LNS 25; [1974] 1 MLJ 10. In another case of *Leaf v. International Galleries* [1950] 1 All ER 693, referred to by the defendant, Denning LJ held *inter alia* that the buyer had accepted the picture. He had ample opportunity to examine it in the first few days after he had bought it. There was time for the buyer to see if the condition or representation was fulfilled. Yet he has kept it all this time. Five years have lapsed, without any notice or rejection. He cannot now claim to rescind (at p. 91).

[24] In view that the plaintiff had been given the opportunity to inspect the scrubber, and the fact that the plaintiff did not raise any objection during the T&C, it was submitted that the plaintiff must be deemed to have accepted the scrubber.

[25] The defendant also submitted that the emission of bad odour was due to the negligence of the plaintiff. The odour problem was due to the plaintiff's failure in maintaining the scrubber properly and keep it in an efficient working order. The main reasons behind the emission of bad odour are summarised as follows:

(i) the failure of the plaintiff to discharge the washing water every three days;

(ii) no pipe was installed by the plaintiff connecting the scrubber to the waste water treatment plant ('WWTP') to discharge the sludge and/or washing water from the scrubber;

(iii) the WWTP only allows the intake of discharge of less than $1m^3$ per hour whereas the scrubber discharges $16m^3$ at once. In other words, the WWTP is of limited capacity; and

(iv) Others as stated in the filed citation of DOE.

[26] The defendant submitted that the gaseous components from the production process, which is the dehydration tank would enter into the scrubber to remove the air pollutants. As such, the washing water in the scrubber acting as a filter of the gaseous component to absorb acidic gases from the dehydration tanks would then require to be drained away regularly every three days so that the washing water will be replenished by clean fresh water. (see p. 547 of common core bundle). Clearly, it is the responsibility and the duty of the plaintiff to ensure the scrubber was maintained in a proper manner. It is however apparent that the plaintiff only discharged the washing water every two weeks. (see pp. 280-281 of common core bundle)

[27] The defendant also relied on the NABBIR laboratory report dated 29 May 2015 (see pp. 917-953 of common core bundle). This report was prepared upon receipt of the complaint from the plaintiff. The report indicated and confirmed that the scrubber system was in full compliance with the requirements of DOE. Therefore, the defendant had not caused the suspension of the plaintiff's license by the DOE.

[28] The defendant further submitted that at all material times, it was not within the defendant's scope of duty to ensure that the person who handles Scrubber No. 8 was a certified environmental professional in scrubber operation (CePSO) qualified person. Defendant assumes that the plaintiff was well aware of the need to ensure the scrubber was handled by CePSO qualified person, even way before the installation of Scrubber No. 8. Whether or not the plaintiff sends any personnel for training with any approved trainer was not within the control and knowledge of the defendant.

[29] The defendant argued that they should not be held liable for the explosion which happened on 24 June 2015. The argument was premised on the facts that on the day of the explosion, the plaintiff hired KC Choong Engineering Works (hereinafter referred to as "third party") to replace the original non-faulty PVC piping into Gl (mild steel) piping on their own accord. During the installation work of the Gl piping, the explosion occurred and the employees of KC Choong Engineering Works were working on the Scrubber No. 8 when the incident occurred and the contractor in performing the work had carried out welding on the spot which had caused splatters or sparks that resulted in explosion.

[30] It was also pointed to us that its own witness, DW2 being the contractor who carried out the installation work had admitted in his testimony that it was the plaintiff who contacted him to carry out the installation of Gl piping, not DW1 Andrew Leong/the defendant. Hence, the evidence of PW3 who contended that there was a discussion between Andrew Leong, DW1 and the workers prior to the installation cannot be true in view of the fact that the workers started their work at 11am and Andrew Leong only arrived at the plaintiff's premises around 3.30pm. Therefore, the plaintiff's assertion cannot and must not stand. It is the defendant's position that Andrew Leong had no knowledge about any repair work that has been carried out on the day of the incident. In fact, during the cross-examination, PW3 confirmed that Andrew Leong was absent during the repair works.

[31] The defendant submitted that PW3 has been giving numerous contradictory testimonies and therefore, was not a credible witness. As such the integrity, veracity and reliability of PW3 was doubtful. Hence, it was submitted that the learned judge has erred in law and in fact to consider these contradictory testimonies given by PW3 to be more probable than DW2 and DW3. On top of that, the plaintiff had failed to ensure that all safety precautions have been duly complied with before the installation began ie,

the plaintiff's oil heater dehydration tank connected to the scrubber was not shut down during welding works which ignited the combustible gas within the scrubber coming from the dehydration tank.

[32] The defendant also relied on the photographs of the explosion at Pentas Flora's factory (see p. 993 to 999 of common core bundle) which explicitly showed the vapours and white fumes escaping from the scrubber after the explosion. This clearly shows that the dehydration tanks were still operating during the progress of work and emitting flammable gases into the scrubber, which eventually caused the explosion. The dehydration tanks must not operate during any servicing or installation works carried out on the equipment connecting to it. Moreover, no proper supervision had been conducted during the installation and according to PW3, he only supervised the workers for two hours out of the estimated eight hours. In essence, there was no safe system at work.

[33] The defendant submitted that being the experienced scrubber manufacturer it would not commit such plain negligence by carrying out welding works in such manner. It is plain that it was the negligence of the plaintiff in engaging a third party without the defendant's knowledge that had caused such incident.

[34] In summary, the defendant contended that:

(a) The workers were called by the plaintiff without the knowledge of the defendant.

(b) No evidence to show that the defendant has instructed the workers to carry out any work on the day of incident.

(c) No proper safety precautions and proper supervision carried out by the plaintiff during the installation of the Gl piping.

(d) Oil heater dehydration tank connected to the scrubber was not shutdown.

[35] The defendant submitted that the plaintiff has not discharged the burden of proof in proving the claims against the defendant. As a whole, the defendant claimed that the learned judge had failed to make proper assessment on the evidence, therefore, the decision was erroneous in fact and in law which require this court to intervene. The court ought to find the plaintiff liable to pay outstanding amount owing to the defendant.

Decision

[36] We have read the learned judge's grounds of judgment. The judgment contained full analysis on the issues that were raised and argued before the court. It also contained complete testimonies of each and every witnesses from the plaintiff and the defendant. The plaintiff's witness are PW1, PW2,

PW3, PW4 and defendant's witnesses are DW1, DW2, DW3, DW4 and DW5. Contemporaneous documents were referred to during trial and the learned judge had evaluated the documentary evidence.

[37] On the issue of T&C raised by the defendant, we discovered that it was never a specific issue before the learned judge; neither was the issue pleaded by the defendant as part of its defence in the statement of defence. The defendant's submission at the High Court (see pp. 1659 to 1689 of appeal record (vol. 2J), part C, also did not specifically relied on ss. 41 and 42 of the Sale of Goods Act 1957 as part of the argument.

[38] It is our considered view that it is trite law that court shall only decide on issues which were pleaded and not otherwise (see the Court of Appeal case of *Tan Leng Choo v. Law Teck Huat* [2008] 1 LNS 568; [2009] 1 MLJ 820, *Hong Leong Bank Berhad v. Asakura Industry Sdn Bhd & Ors* [2010] 1 LNS 2031; [2011] 9 MLJ 723. This principal was reiterated by the Federal Court in the case of *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 where Ramly Ali FCJ held that it is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; and *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 10 1 KB 628, Scrutton LJ ruled that: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues, there must be pleaded on the record by amendment'.

[39] The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings, it could not be allowed to be argued and to succeed on appeal (see: *AmBank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] 3 MLJ 1 (FC)).

[40] The defendant is bound by its own pleadings. Accordingly, it is our view that it cannot during this appeal and in submissions raise new issues to claim that since the plaintiff did not raise any objection during the T&C, therefore, the plaintiff must be deemed to have accepted the scrubber.

[41] Be that as it may, even if the issues were said to have been raised indirectly during the trial, the attention is drawn to the learned judge's finding in his judgment that although Scrubber No. 8 was installed on 20 January 2015 (the date of the T&C), the defendant's associated company, Master Jaya Greentech Sdn Bhd as notification consultant, only made the statutory submission for "new construction" on behalf of the plaintiff on 18 June 2015 (see p. 459, appeal record (vol 2G) part C). It was the court's finding that the submission to DOE ought, in fact, to have been done prior to the installation and commissioning of Scrubber No. 8. In other words, the

installation was done without DOE's knowledge or approval, therefore, the plaintiff cannot be deemed to have accepted the scrubber during the T&C conducted on 20 January 2015.

[42] Having considered the appeal, we were satisfied that the entire decision of the learned judge derived from the finding of facts is correct and there is no appealable error on the outcome of the case that the defendant was negligent in ensuring that the scrubber installed was fit for its purpose and its negligent act had caused the plant to be suspended by the DOE and the explosion which happened on 24 June 2015 was caused by the negligence of the defendant in repair work. The judge's analysis of the facts is found at paras. [65] to [123] of his grounds of judgment.

[43] We found the arguments advanced by the defendant before us were basically the same that were submitted at the High Court. The issues raised were principally challenging the finding of facts by the learned judge. The learned judge had considered the evidence of witnesses and documents presented before him. The learned judge had given his full reasons for his decision and we agreed with the reasoning given by the learned judge. The decision was not plainly wrong or perverse. We were satisfied that there is no appealable error in the High Court's judgment that merit our intervention.

[44] In *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203; [2010] 3 MLJ 425, it was held that an appellate court will not, generally speaking, intervene and interfere unless the trial court is shown to be plainly wrong in arriving at its conclusion. Matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction is also often not interfered with by the appellate courts. An appellate court would normally not want to substitute its own subjective assessment of these matters to findings and conclusions arrived at by courts from where the decisions are appealed from. The other reason, of course, is that the appellate court is going to be flooded by appeals if it were too easily persuaded to substitute its own decision in those instances. After all, each judge has his own subjective view on many issues. This is so in spite of the fact that judges have gone through the same training and perhaps gone through the same experience but may still decide differently (see: *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25).

[45] The learned judge's decision is based on the fact that the defendant had given warranties that the scrubbers would comply with DOE regulations and defective parts would be replaced without any costs to the plaintiff. The DOE had recommended the defendant to the plaintiff. The defendant held itself out as a professional in the field of air pollution. It conducts air pollution control courses for the DOE. The defendant was to advise, and handle all air pollution issues, in regard to the scrubber systems for the plaintiff. The plaintiff relied completely on the defendant.

[46] Based on the warranties, the plaintiff engaged the defendant to provide them with an air pollution control system to ensure bad odour is not emitted into the environment. The defendant also gave assurances that the plaintiff's air pollution control system will comply with the DOE's requirements and in particular with the Environmental Quality (Clean Air) Regulation 2014. The defendant issued a letter of warranty on the proposed two sets of scrubbers system (Model: MJSC-240) (see: p. 496, appeal record (vol. 2G), part C.

[47] Based on the assurances, the plaintiff entered into the contract with the defendant for the supply, delivery and installation of two scrubber systems ie, Scrubber No. 8 and Scrubber No. 9. The total price was for RM1,000,000. The contract is contained in a quotation and a purchase order both dated 24 December 2014 (see: pp. 542 to 550 of core bundle and pp. 633 to 634 of appeal record (Vol. 2 E), Part C. Besides that, the defendant also gave a warranty as per the letter of performance guarantee dated 24 December 2014 (see pp. 551-553, common bundle) which *inter alia* confirmed that the scrubber will achieve the odour scrubbing efficiency of 60% to 70% and comply in accordance to DOE's rules and regulation. It was also stated that the scrubber system will remove 90%-95% of the fumes/smoke/mist generated by the dehydration tanks.

[48] The scrubber systems are meant to remove bad smell from the air before releasing it into the atmosphere. However, after two months, on or around March 2015, the respondent complained that the Scrubber No. 8 was not working in reducing the bad odour. The bad odour was due to various reasons as indicated in the DOE's field citations dated 3 June 2015, 13 July 2015 and 14 July 2015. (see pp. 556-560 of common core bundle).

[49] The facts revealed that before Scrubber No. 9 could be installed, several problems arose *inter alia* that Scrubber No. 8 was not working in reducing bad odour. The residents in the plaintiff's area complained. Due to this, the DOE visited the plaintiff's plant on 3 June 2015 to conduct checks. The DOE inspected Scrubber No. 8 and the DOE was unhappy. This led the DOE to issue a document called a field citation. It was not disputed that there were a few visits by DOE and a few citations were issued to the plaintiff.

[50] The field citation stated that Scrubber No. 8 was not working in reducing bad odour and there was no properly certified person operating the scrubber (CePSO). The plaintiff notified the defendant about this field citation. The plaintiff had no idea about the need for a CePSO. The learned judge had analysed the issue at paras. 89 to 90 of the grounds of judgment. He accepted the evidence of PW2 that it was the defendant's responsibility to advise the plaintiff on every aspect of the scrubber system, including regulatory (DOE) compliance.

[51] On the issue of qualified person (CePSO) to handle the scrubber system, the learned judge found there is no evidence that CePSO was brought up at any time prior to the first field citation. The learned judge was of the view that this is another manifestation of breach of contract by the defendant. It was found that the plaintiff had (*via* PW2) made it absolutely clear to DW1 that the defendant as the expert in this area had to advise the plaintiff on "everything" to which DW1 agreed. But, the defendant did not deliver, as promised.

[52] The court found that it was clearly the defendant's obligation to ensure that the person who handled Scrubber No. 8 was a CePSO qualified person. The defendant is a DOE certified CePSO trainer and it would have been easy enough for the defendant to have trained the plaintiff's staff so that they are CePSO qualified. However, it was found that the arrangement for training was only done after the DOE issued the first field citation on 3 June 2015 (see appeal record p. 665 (vol 2E) part C, at para 3(2)) which warned the plaintiff to make sure the scrubber is supervised/handled by a competent person (CePSO). Discussion on CePSO training only started after that (see DW1's email dated 10 June 2015 to PW1 at p. 406, appeal record (vol 2G) part C). Clearly, the defendant failed to provide "training" to the plaintiff since this was its contractual obligation.

[53] The defendant relied on a one-page document of Scrubber No. 8 on 20 January 2015 (p. 346, appeal record (vol. 2F) part C, p. 576 of common core bundle) however, it was not accepted as providing training because it was not related but only to show that the scrubber was tested and commissioned. We agreed with the learned judge that the document is not related to training.

[54] The defendant's witness DW5 testified that he conducted a two hours training (see: Q&A 7 and Q&A 8, DW5A), but the evidence was never agreed by the plaintiff neither DW5's evidence was corroborated that such training was given. The learned judge believed PW2's evidence at Q2(b) (iii) (PW2A), when PW2 said that "... saya memberitahu beliau (DWI) bahawa oleh kerana Master Jaya ialah pakar professional dalam bidang kawalan percemaran udara, maka mereka harus menasihati kami apa yang diperlukan. Andrew Leong setuju". This part of PW2's evidence was not challenged.

[55] The second aspect we observed is the guarantee given by the defendant that Scrubber No. 8 was able to achieve 60% to 70% odour scrubbing efficiency were never met because there is no evidence to show its guaranteed percentage efficiency. At the same time, the learned judge also found there was also no evidence that Scrubber No. 8 had a 90% to 95% efficiency in removing smoke, mist, fumes from the chimney for Scrubber No. 8. The learned judge was of the opinion that whatever warranty or guarantee that was given, was only on "paper" and found, the reality on the ground (or in

the air) was starkly different in that the environment in the plant was polluted with bad odour and Scrubber No. 8 clearly did not function as it was supposed to.

[56] The facts revealed that the odour problems at the plant did not improve. Due to this, the DOE, on 13 July 2015 and 14 July 2015 carried out two more site inspections (see pp. 558 to 559 of common bundle). This time the DOE discovered that there was no monitoring equipment installed for Scrubber No. 8. Further, the DOE stated that there was no written notification submitted to the DOE about Scrubber No. 8 being installed. Also, the in-built drawings of Scrubber No. 8 had not been submitted to the DOE. On the aspect of submission of "as built drawing" the learned judge found that the defendant was also responsible for submitting the final written declaration and "as built drawing" for Scrubber No. 2, Scrubber No. 8 and Scrubber No. 9, but this was not done. The DOE had warned the plaintiff that the "as built drawing" were not submitted. This was clearly the defendant's responsibility (see para. 92 of the grounds of judgment).

[57] Because of the abovementioned problems, the DOE suspended the plaintiff's operations on two different occasions. From 15 July 2015 to 21 July 2015 (the "first suspension") and 24 August 2015 to 1 October 2015 (the "second suspension"). These suspensions led to losses. The plaintiff claimed that the defendant was negligent in ensuring that the scrubber installed was fit for its purpose and this alleged negligent act had caused the plant to be suspended by the DOE.

[58] The learned judge found that the problems had been proven by the plaintiff. The most important facts discovered in the finding of the learned judge in our view is that the defendant, through its associated company, Master Jaya Green Tech Sdn Bhd was, in fact, the duly appointed environmental consultant for written approval (KB) application (see: plaintiff's letter dated 7 May 2013 to DOE p. 495, appeal record (vol. 2G) part C). Based on this document, we agreed with the learned judge's finding that it is the defendant's (or its associated company's) obligation to notify the DOE and make the necessary submissions in relation to the installation of any air pollution control systems, such as the wet scrubber systems that were installed at the plaintiff's waste processing plant. Indeed, it cannot be disputed that the notification to DOE with regard to Scrubber No. 8 and Scrubber No. 9 was only made on 18 June 2015 (see defendant's letter dated 18 June 2015 p. 570, appeal record (vol. 2G) part C).

[59] We also noted that the learned judge had made his finding that, in the field citation dated 14 July 2015, (p. 669 appeal record (vol. 2E) part C), the complaints or warnings by DOE were in relation to the functioning of Scrubber No. 8. The learned judge made a correct inference that there was a problem with Scrubber No. 8 in that it was inviting all kinds of adverse citations by the DOE.

[60] Be that as it may, the defendant's stand is always that there was nothing wrong with Scrubber No. 8 and contended that the problem was with the WWTP (relating to the discharge of effluent). It was submitted that the emission of bad odour was due to the negligence of the plaintiff. The odour problem was due to the plaintiff's failure in maintaining the scrubber properly and keep it in an efficient working order. On this aspect, the learned judge found the defendant's stand as being illogical to uphold on the ground that if that is the case then one would have expected as a matter of probabilities and sheer logic that the defendant would have, from the outset noted the so-called problem with the WWTP and informed the plaintiff accordingly. But this was not done. The learned judge further stated that no doubt, the DOE field citations did make reference to the WWTP, but that is not proof that it was the WWTP which was impeding Scrubber No. 8 from removing bad odour exiting from the chimney.

[61] For the defendant to succeed in raising the issue on WWTP which in our view is very important is for the defendant to show some relevant evidence to substantiate its claim. Unfortunately, the learned judge had found the defendant did not furnish any technical evidence to prove on a balance of probabilities that the WWTP was the culprit which was impeding Scrubber No. 8's efficiency and caused bad odour to be emitted into the environment. Based on the evidence, the learned judge found that since, it was the defendant who designed Scrubber No. 8 it was their obligation, as the air pollution control experts, to have advised the plaintiff, if it is true that the WWTP was the source of the problems.

[62] Further, we noted the learned judge did not find any contemporaneous or compelling evidence to suggest that the WWTP was the cause of the problem. The learned judge even stated that the WWTP issue was thought of as a convenient escape route for the defendant who clearly could not live up to the warranty and guarantee as to the odour scrubbing efficiency of Scrubber No. 8. It was the finding of facts that the field citations and notifications from the DOE had resulted in two suspensions of operation at the plant. It was found that the defendant did not give a satisfactory response.

[63] Clearly, the learned judge had applied his mind and formed his opinion which the appellate court would normally not want to substitute its own subjective assessment of these matters to findings and conclusions arrived at by courts.

[64] The defendant also relied on the NABBIR laboratory report dated 29 May 2015 (see pp. 917-953 of common core bundle). This report was prepared upon receipt of complaint from the plaintiff. The report indicated and confirmed that the scrubber system was in full compliance with the requirements of DOE. In other words, the report is favorable to the defendant. Therefore, the defendant submitted that the scrubber was fit for its purpose at all material times.

[65] The learned judge held that the defendant failed to produce the maker to back up and defend the contents in the report (see paras. 72 to 76 of the grounds of judgment). The learned judge made his finding that the Nabbir report is of no probative value and cannot be considered as the maker, Mr Chong Kok Heng did not testify and subject himself to cross-examination. In other words, the Nabbir report is a hearsay evidence.

[66] The requirement of the best evidence rule is that the maker of a document must be called to prove the document. It is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called failing which will result in the contents of the documents being hearsay (*Alliedbank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1; *Keruntum Sdn Bhd v. The Director of Forest & Ors (supra)*; *UEM Group Bhd v. Genysis Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2010] 2 MLRH; *Sampo Materials (M) Sdn Bhd v. Tenaga Nasional Berhad* [2015] 9 CLJ 902; [2016] 1 MLRH 279)

[67] Be that as it may, having looked at the report, the learned judge stated in his judgment that at any rate, the Nabbir report most certainly did not state that Scrubber No. 8 had attained 60% - 70% odour scrubbing efficiency and/or that it successfully removed 90% - 95% of the fumes/smoke/mist generated by the dehydration tank. This certainly negated the defendant's contention (para. 9(e) of the defence) that Scrubber No. 8 attained 60% - 70% odour scrubbing efficiency. The burden of proof was clearly on the defendant to prove on a balance of probabilities that there was no breach of contract in this regard. It was concluded that there was just no evidence whatsoever to establish that Scrubber No. 8 attained 60% - 70% efficiency at removing bad odour which was exiting from the chimney.

[68] The defendant also submitted that the plaintiff had also made an admission in their reply letter to DOE dated 18 June 2015 that the scrubber installed was fit for its purpose. (see p. 563 of common core bundle) and that this critical admission by the plaintiff would wholly undermine the plaintiff's case, but was clearly overlooked by the learned High Court Judge.

[69] It is not disputed that the scrubber systems are meant to remove bad smell from the air before releasing it into the atmosphere. As alluded to earlier, after two months, on or around March 2015, the respondent complained that the Scrubber No. 8 was not working in reducing the bad odour. We noted that although the plaintiff's reply letter to DOE dated 18 June 2015 stated that the scrubber installed was fit for its purpose, however, the learned judge found that the defendant was the duly appointed environmental consultant means that it is the defendant's obligation to notify the DOE and make the necessary submissions in relation to the installation of any air pollution control systems.

[70] It was also established that the defendant as the expert in this area had to advise the plaintiff on "everything" to which DW1 had agreed. Therefore, in our view, the learned judge has not missed the point because the so-called admission as contended by the defendant was made without getting the proper advice from the defendant. We noted that the DOE's instruction to the plaintiff is for the plaintiff to make sure the operation and function of the scrubber is in accordance with its design. This is surely within the expertise of the defendant and clearly the defendant's responsibility not the plaintiff. In view of that, we did not think it as an admission but rather a mere reply.

[71] We agreed with the learned judge's conclusion in respect of Scrubber No. 8 as follows:

> I have concluded earlier that Scrubber No. 8 was not fit for purpose (section 16 SOGA) and the defendant's warranties/guarantee on scrubber efficiently were not fulfilled as such, Scrubber No. 8 was not up to mark as an air pollution control device. It was quite useless as far as the plaintiff was concerned as they were still having problems with DOE and eventually they had to replace it with equipment from China. Clearly, Scrubber No. 8 was not able to control bad odour pollution and it had therefore failed as an air pollution control device

[72] The defendant argued that they should not be held liable for the explosion which happened on 24 June 2015. The defendant in the written submission raised another ground that the trial court in deciding the case has applied the doctrine of non-delegable duty. However, the issue of non-delegable duty of care was not pleaded by the plaintiff in the first place. In support, the defendant referred to the Court of Appeal case of *Kee Boon Suan & Ors v. Adventist Hospital & Clinical Services (M) & Ors And Other Appeals* [2018] 6 CLJ 334; [2018] 5 MLJ 321 where the Court of Appeal said:

> More importantly, we note that the issue of non-delegable **duty of care was not even pleaded by the Patient and her** parents in the first place. **Therefore, the issue ought not to have been considered by the learned JC when it was raised at the late stage of the submissions. We do not agree with the submissions** of learned counsel for the Patient and her parents who, in relying on the Federal Court decision in *Tun Hussein Onn National Eye Hospital v. Megat Noor Ishak bin Megat Ibrahim & 2 Others* (Federal Court Civil Appeal No. 01(f)-26-04/201 S(W), submits that even if "the plaintiff had not pleaded direct liability on the Hospital's part for negligence ... the essence of a non-delegable duty have been pleaded".
>
> With respect, we are of the opinion that *a claim made under the doctrine of non-delegable duty of care must be expressly pleaded against the Hospital. Otherwise from a plain reading of the Counterclaim of the Patient and her parents, it is clear that their claim against the Hospital is based on vicarious liability but not on the cause of action of non-delegable duty of care.*

[73] The defendant submitted that the doctrine of non-delegable duty ought not to have been considered by the High Court Judge as it was not even raised by the plaintiff.

[74] The principle of non-delegable duty heightens the standard of care so that the requirement of reasonable care is not met simply by delegating the function to a competent contractor, but by ensuring that due care is exercised in the performance of that function by whoever is appointed to do so. Hence, in this case, the first defendant would have a non-delegable duty to ensure that the doctors/consultants and other medical professionals, including the second defendant, working at or from its medical center, have the necessary qualification, skill and competence to carry out their tasks, and to ensure that they do not breach their duty of care owed to the patients who use their medical facilities. See: *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529; [2018] 1 MLJ 685 FC.

[75] We considered the point raised. We examined the plaintiff's amended statement of claim. At paras. 39 and 40, the plaintiff pleaded as follows:

> 39. The incident was caused by the negligence of Master Jaya;
>
> 40. Master Jaya as professional service provider, or the supplier of the scrubber system and/or the party who was present in Pentas Flora's premises on the day, had a duty to ensure that it did not carry out repairs which would cause the scrubber to explode and fall. In particular, it was negligent in that:
>
> (a) It caused or permitted the scrubber to fall off;
>
> (b) It caused or permitted an explosion at the plaintiff's premises when it performed the repair work;
>
> (c) It caused or permitted the scrubber to be repaired in an unsafe and dangerous manner; and
>
> (d) It failed to take any or any adequate measures to secure the scrubber safely to be repaired.

[76] We agreed with the defendant that the issue of non-delegable duty was not specifically pleaded. However, at the High Court, based on the plaintiff's pleaded case at paras. 39 and 40 of the amended statement of claim, the issue to be tried was: who was responsible for the incident. The defendant submitted that there was conflicting testimony as to who had engaged the workers on that day. The plaintiff's case is that the defendant is liable for the negligence of KC Choong Engineering Work's employees. KC Choong was engaged by Krutech Sdn Bhd. Krutech was engaged by the defendant.

[77] The learned judge made factual findings that it was the defendant's sub-agents who caused an explosion at the plaintiff's premises on 24 June 2015. The learned judge had analysed the conflicting testimony. He found that it was the defendant who had engaged the workers to carry out the repairs and that the defendant was responsible for the incident. He believed the plaintiff's version of events as follows:

(i) The workers who carried out the repairs were the defendant's sub-agents.

(ii) He found it improbable that the plaintiff would privately engage the sub-agent, when it was the defendant's responsibility to repair the scrubber. And, that in any event, there was no evidence that the plaintiff engaged the sub-agent privately for that day.

(iii) He found that DW1's presence at the plaintiff's premises, on the day of the Incident indicated that it was the defendant who was carrying out the repair works through its sub-agent, KC Choong.

[78] The trial judge made a factual finding that it was "repair works" that were being conducted. The judge had considered the issue in his grounds of judgment at paras. [102] to [112]. Having considered the evidence and the circumstances, the learned judge formed his opinion that it is more probable than not it was the defendant who made the arrangements for workers to be sent to repair Scrubber No. 8 on 24 June 2015 and they are accordingly vicariously liable for the negligence of their sub-contractor/sub-subcontractor (see para. [112]). In other words, the court found the workers were the sub-agent of the defendant and the defendant is liable for the acts of its sub-agent.

[79] As for how a principal is liable for the acts of its sub-agent, aid is found in the case of *The United States Of America v. Shearn Delamore & Co And Drew & Napier; Joseph Lee Henn Shen (Third Party)* [2007] 4 CLJ 154: at p. 180, para. 22(m) of the case, it stated as follows:

> (m) Where a sub-agent is properly appointed, the following consequences ensue:
>
> (i) the principal is, so far as regards third persons, properly represented by the sub-agent, and is bound by, and responsible for his acts as if he were an agent originally appointed by the principal; in other words, the acts of the sub-agent bind the principal within the scope of the sub-agent's authority;
>
> (ii) the agent becomes responsible to the principal for the acts of the sub-agent;
>
> (iii) the sub-agent becomes responsible for his acts to the agent, but not to the principal, except in case of fraud or willful wrong; where a fraud or willful wrong is committed by the sub-agent, the principal has an option to hold either the agent or the sub-agent responsible for the act or he may hold both of them responsible.

[80] We were satisfied that the learned judge's finding of the negligence is entirely factual. In our view, there are no errors which require appellate intervention.

[81] On the issue of losses, the defendant submitted that the loss of profit being the sum of RM27,116.40, RM1,022,038.82, and RM60,548.37 are frivolous in view that the suspension of the plaintiff's license was clearly not due to the negligence of the appellant. The claims are not fully supported by invoices, credit notes, receipts of payments and purchase orders to customers, as well as from the suppliers or contractors, and to be verified by independent and professional third parties or witnesses. Further, no maker was called to verify the contents of the documents tendered in relation to such during trial.

[82] The cleaning costs of RM48,788 allowed by the learned High Court Judge carried no basis in view that no documentary evidence has been tendered before the court. The purchase of the Chinese equipment totalling USD12,660 and RM138,252.44 had nothing to do with the scrubber and it was done on the plaintiff's own accord. The installation of the condenser would in fact enable the plaintiff to extract more oil for profit. (Q&A 49 p. 83 of common core bundle). The respondent's claim on RM10,600 was uncalled for. It was an agreed fee for the defendant to carry out license submission for the renewal of the operation license of the plaintiff due to the incorporation of the new thermal tanks and the condenser, which has nothing to do with the defendant's scrubber. (Q&A 66 p. 88 of common core bundle).

[83] The defendant referred to the letter of performance guarantee. (See pp. 551 to 553 of core bundle) and relied on the exclusion clause then argued that because of this document, they need not pay the plaintiff at all. It was also submitted that the warranty clause in the agreement does not include any damage and/or losses due to production losses and consequential losses.

[84] We noted that the learned judge had considered the letter of performance guarantee at length. He found that the exclusion clause did not apply:

(i) Firstly, the exclusion clause was uncertain, unclear, and ambiguous; and therefore was rendered ineffective. This was because it was unclear whether the efficiency rate of scrubber No. 8 was warranted to be 60 – 70% or 90 – 95%. The learned judge relied on *Chitty on Contracts* that "it is trite that exemption clauses must be expressed clearly and without ambiguity, or they will be ineffective".

(ii) Secondly, due to the ambiguity, the learned judge applied the *contra proferentum* rule against the defendant and held the exclusion clause to be ineffective.

(iii) Thirdly, the defendant's argument that the plaintiff's losses were "consequential losses" and therefore excluded by the exclusion clause; was dismissed. The learned judge held "that the plaintiff's losses, as

claimed in the statement of claim were not consequential losses, but instead losses that arose directly and naturally from the defendant's actions". In this, the judge relied on the case of *Croudace Construction Ltd v. Cawoods Concrete Products Ltd* [1978] 2 Lloyds 55 at p. 62 (see paras. 130 to 132 of the grounds of judgment).

[85] At para. [134] of the grounds of judgment, the learned judge held that the quantum of damages was not credibly challenged by the defendant. Rather, the challenge was as to the plaintiff's entitlement to make the claims. The learned judge decided to allow the reliefs as per the plaintiff's amended statement of claim as shown in the said para. [134] of the judgment.

[86] In our considered opinion, in reviewing an assessment of damages, the court is bound by the principles as enunciated in the case of *Flint v. Lovell* [1934] All ER 200 which held:

> the court will be declined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that thus court should be convinced either that the judge acted upon some wrong principles of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

[87] The same principles have been approved and followed in the Malaysian Federal Court case of *Mohamed Ibrahim & Anor v. Christopher Piff & Anor* [1980] 1 LNS 139 where Wan Suleiman FJ held that:

> It would not be amiss to repeat what Lord Wright said in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at p 616:
>
> > Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the *assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages.*
>
> It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint v. Lovell* [1935] 1 KB 354. In effect the court, before it interferes with an award of damages, *should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference*. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

[88] We were fully satisfied that the learned judge had not acted on the wrong principle in assessing the quantum of damages. Since there is no appealable error in his judgment, we decline to disturb the finding on the quantum of damages awarded by the learned judge to the plaintiff.

Conclusion

[89] It is our unanimous decision that the appeal has no merit. We affirmed the entire decision of the High Court on liability and damages. The appeal is dismissed with costs RM30,000 for this appeal as well as the dismissed notice of motion by the appellant.